No. 76-5935

In the Supreme Court of the United States

OCTOBER TERM, 1977

RICKEY LEE DURST, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINIONS BELOW

The opinions of the court of appeals (A. 44–45) and the district court (A. 27–37) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1976 (See A. 44–45). The petition for a writ of certiorari was filed on December 27, 1976, and was granted on March 21, 1977 (A. 46). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a fine or a requirement of restitution may be imposed as a condition of probation under the Federal Youth Corrections Act.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 5010, as amended, Pub. L. 94–233, 90 Stat. 232, provides as follows:

> (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.
>
> (b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or
>
> (c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense

> or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.
>
> (d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.
>
> (e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Commission shall report to the court its findings.

18 U.S.C. 5021(b) provides as follows:

> **Certificate setting aside conviction.**
>
> * * * * *
>
> (b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

18 U.S.C. 5023(a) provides in pertinent part:

> **Relationship to Probation and Juvenile Delinquency Acts.**
>
> (a) Nothing in this chapter shall limit or affect the power of any court to suspend the

imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 of this title [18 U.S.C. 3651–3656] * * * relative to probation.

18 U.S.C. 3651 provides in pertinent part:

Suspension of sentence and probation.

* * * * *

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

* * * * *

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had * * *.

STATEMENT

Petitioners Durst and Rice pleaded guilty to obstructing the mails, in violation of 18 U.S.C. 1701 (A. 8, 21). Petitioners Blystone and Pinnick pleaded guilty to stealing property with a value of less than

$100 from a government reservation, in violation of 18 U.S.C. 661 (A. 12, 16). Petitioner Flakes pleaded guilty to theft of property belonging to the United States with a value of less than $100, in violation of 18 U.S.C. 641 (A. 26).[1]

Petitioner Durst was given a suspended sentence of six months' imprisonment and was placed on probation for three years under the Youth Corrections Act ("YCA"), 18 U.S.C. 5010(a); among other conditions of probation, he was ordered to pay a $100 fine and to make restitution in the amount of $160 (A. 8). Petitioner Rice was given a suspended sentence of six months' imprisonment and was placed on probation for two years under the YCA, 18 U.S.C. 5010(a), pursuant to the provisions of Pub. L. 94–233, 90 Stat. 230, 18 U.S.C. 4216, which permit sentencing of young adult offenders under the YCA in appropriate cases; Rice was ordered to pay a fine of $100 as a condition of his probation (A. 21). Petitioners Blystone and Pinnick were placed on probation for two years and one year, respectively, under the YCA, 18 U.S.C. 5010(a); both were ordered to pay fines of $100 as a condition of probation (A. 12, 16). Petitioner Flakes was placed on probation for one year under the YCA, 18 U.S.C. 5010(a), and ordered to pay a fine of $50 as a condition of probation (A. 26).

[1] Under the statutes that petitioners were convicted of violating (18 U.S.C. 641, 661, 1701), penalties of a fine or imprisonment, or both, can be imposed.

In each case, the guilty pleas were taken and the sentences imposed by a United States Magistrate. Petitioners appealed their sentences to the United States District Court for the District of Maryland, which consolidated the appeals and affirmed the sentences imposed by the magistrates, ruling that a fine may be imposed as a condition of probation under the YCA (A. 27–37). The district court reasoned that a fine is entirely consistent with the rehabilitative intent of the YCA, since the fine will "in many cases, stimulate the young person to mature" into a law-abiding citizen, by causing him to accept "responsibility for his transgression" (A. 35–36). It also noted that use of fines is consistent with the legislative intent of the Act, since Congress stated that it intended, in enacting the YCA, to leave the power to grant probation undisturbed, and since the general probation statute, 18 U.S.C. 3651, "fully authorizes the imposition of a fine, as well as restitution, when granting probation" (A. 36).

The district court also observed that if fines were precluded as a condition of probation under the YCA, the sentencing court would be limited, if it wished to impose a fine as a condition of probation, to sentencing a defendant under the adult probation provisions of Section 3651. As a result, the offender would be denied the advantage otherwise available under the YCA of having the conviction set aside and his record expunged through the procedure provided in Section 5021(b). Permitting this result

through "narrowly construe[ing]" the Act "would be inimical to the very persons that the Act was designed to protect" (A. 36–37).

The court of appeals affirmed in a brief opinion, on the authority of its earlier decision in *United States* v. *Oliver,* 546 F. 2d 1096, petition for writ of certiorari pending, No. 76–5632, stating "that the imposition of a fine as a condition of probation is consistent with the Act" (A. 45). The court of appeals also ruled that "[f]or the reasons expressed in *Oliver,* we believe that a requirement of restitution is also consistent" with the Act (*ibid.*).

The Fourth Circuit in *Oliver* had determined that precluding use of fines as a condition of probation "would not only be contrary to the literal wording of the statute, but would also diminish the liberal use of the probation alternative." 546 F. 2d at 1099. The court noted that the YCA "by its terms, does not prohibit the imposition of monetary fines, but only precludes the imposition of a prison sentence" (*id* at 1098). Then, relying on this Court's statement in *Dorszynski* v. *United States*, 418 U.S. 424, 436, that "[t]he legislative history [of the YCA] clearly indicates that the Act was meant to enlarge, not [to] restrict, the sentencing options of federal trial courts in order to permit them to sentence youth offenders for rehabilitation of a special sort," the court concluded that "the denial of the power to impose a fine in connection with probation would not be consistent with [this] congressional intent" of "increas-

[ing] the alternatives a district judge may resort to" in sentencing youth offenders, but would instead "decrease, rather then increase, the alternatives." 546 F. 2d at 1099.

SUMMARY OF ARGUMENT

1. It is clear from both the language and the history of the Youth Corrections Act ("YCA") that Congress intended to leave unimpaired the pre-existing powers of federal judges to impose fines upon young persons convicted of federal criminal offenses, either in connection with a sentence providing for incarceration or, as here, in connection with imposition of a suspended sentence and probation. Similarly, federal courts retain the power to require a convicted youth offender to make restitution as a condition of probation (18 U.S.C. 3651).

The principal accomplishment of the YCA was to afford district judges a new and important option in sentencing young offenders—commitment to the custody of the Attorney General for treatment and supervision. Section 5010(b) and (c) expressly provide that this disposition, if selected, is "in lieu of the penalty *of imprisonment* otherwise provided by law" (emphasis supplied), but they contain no suggestion that fines are similarly displaced. In fact, the words "of imprisonment" were not contained in the statute as originally proposed to Congress by the Judicial Conference. They were subsequently added at the suggestion of the Attorney General, concurred in by the judges who had been active in formulating the

YCA proposal, for the express purpose of preserving the power to impose fines in conjunction with a YCA commitment.

It is not surprising that the same approach held true in connection with the YCA's treatment of probation for youth offenders. Section 5023 explicitly preserves the powers conferred on district courts by other provisions of Title 18 dealing with probation, which, of course, encompasses the power to impose fines and/or require restitution (18 U.S.C. 3651), and the legislative history of the YCA is replete with assertions that these powers were intended to be left absolutely undisturbed.

2. Those courts that have prohibited the imposition of fines in connection with sentences under the YCA have relied for that result principally upon the proposition that fines are punitive and therefore inconsistent with the Act's focus upon rehabilitation of youth offenders. The language and history of the YCA, discussed in Part I of the brief, make it clear that Congress thought otherwise.

Even if this dispositive evidence of Congressional intent were not available, the proposition that fines are inconsistent with the purposes of the Act could not be sustained. While it is true that the Act was designed to displace imprisonment of a youth as an adult offender in most cases, this was predicated largely on serious concern about the adverse consequences of incarceration of youth offenders together with hardened adult criminals, and one cannot extrapolate to the conclusion that all forms of "punish-

ment" were meant to be precluded. And even if purely punitive sentences were meant to be proscribed, fines are not solely punitive, but can often have strong rehabilitative and deterrent aspects as well.

Finally, any objection that fines are impermissibly punitive could not sensibly be extended to requirements that the convicted youth offender make restitution to his victim, and there is accordingly no basis whatsoever for barring that sentencing option. Petitioners' fear that the power to require restitution would be abused by federal judges intent upon imposing fines despite a lack of power to do so is utterly without foundation, particularly as restitution is limited by statute to the amount of the damage suffered by the victim of the crime.

ARGUMENT

I.

THE LANGUAGE AND HISTORY OF THE YOUTH CORRECTIONS ACT SHOW THAT YOUTH OFFENDERS MAY BE REQUIRED TO PAY FINES AND MAKE RESTITUTION

A. INTRODUCTION

The Youth Corrections Act expands the choices available in sentencing youth offenders—that is, persons under the age of 22 years at the time of conviction (18 U.S.C. 5006).[2] The Act was designed "to

[2] Young adult offenders, who have attained their 22nd birthday but not yet reached their 26th birthday at the time of conviction, may also be sentenced pursuant to the YCA, provided the court finds that there are reasonable grounds to believe that the young adult offender will benefit from YCA treatment (18 U.S.C. 4216).

provide a better method of treating young offenders convicted in federal courts * * *, to rehabilitate them and restore normal behavior patterns." *Dorszynski* v. *United States*, 418 U.S. 424, 433. The YCA was modeled after a system of treatment of young offenders developed in England since 1894, known as the Borstal system, and was based on the theory that "the period of life between 16 and 22 years of age was found to be the time when special factors operated to produce habitual criminals." *Id.* at 432–433.

The Act was intended to improve upon the existing methods of treating criminally inclined youths by adding a new sentencing option: commitment of youth offenders to the custody of the Attorney General for individualized treatment. The youth is first sent to a classification center for study and then is either released under supervision or referred to the type of institution or agency—including training schools, hospitals, and forest camps (18 U.S.C. 5011)—"best suited to give him the type of training and treatment which the study at the classification center indicat[ed] should be provided." H.R. Rep. No. 2979, 81st Cong., 2d Sess. 3 (1950) (hereafter referred to as "House Report"). The offender is thereby provided tra[illegible] and guidance, as well as being "segregat[ed] * [illegible] insofar as practicable, so as to place [him] * * * with those similarly committed, to avoid the influence of association with the more hardened inmates serving traditional criminal sentences." *Dorszynski* v. *United States, supra,* 418 U.S. at 434.

The Act provides, in all, for four sentencing options. If the court is of the opinion that the offender does not need commitment, it may, pursuant to Section 5010(a), suspend the imposition or execution of sentence and place the youth offender on probation. Alternatively, if the offender is guilty of an offense punishable by imprisonment, the court may "in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision" pursuant to the YCA (Section 5010(b)). The youth offender must in that event be discharged unconditionally within 6 years from the date of his conviction. If, however, the court finds that the offender may not be able to derive maximum benefit from such treatment prior to the expiration of six years, it may, under Section 5010(c), "in lieu of the penalty of imprisonment otherwise provided by law," sentence the offender to the custody of the Attorney General for treatment and supervision for any further period authorized by law for the offenses of which he stands convicted (or until the earlier release provided for in the Act). Finally, if the court finds that the offender will not derive benefit from youth offender treatment under subsections (b) or (c), then Section 5010(d) authorizes the court to "sentence the youth offender under any other applicable penalty provision." [3]

[3] If the court is in doubt as to the appropriate sentence to impose, Section 5010(e) authorizes a 60-day commitment for observation and study.

B. FINES MAY BE IMPOSED IN CONNECTION WITH A CUSTODIAL COMMITMENT UNDER SECTION 5010 (b) AND (c)

While the various sections of the YCA nowhere explicitly mention fines and restitution—either to prohibit or to authorize such exactions—nevertheless it is clear from both the language and the history of YCA that the pre-existing power of the federal courts to fine youth offenders and to require them to make restitution was specifically and deliberately left unimpaired by Congress in its enactment of YCA.

As *Dorszynski* recognized in considering the extent of the obligation of a trial court to sentence a youth offender under the Act rather than to an ordinary sentence of imprisonment pursuant to Section 5010(d), "the Act was intended to increase the sentencing options of federal trial judges, rather than to limit the exercise of their discretion whether to employ the newly created options" (418 U.S. at 440). The new option added by subsections (b) and (c) of Section 5010—commitment to the custody of the Attorney General for treatment and supervision—is not a total substitute for all pre-existing sentencing options, but is afforded "in lieu of the penalty of imprisonment otherwise provided by law." The natural reading of this language is that the availability of the other penalties provided by law, notably fines, was intended to be left intact for youth offenders as for others convicted of crimes for which fines could by statute be imposed.

This reading is confirmed by the legislative history. The original draft of the YCA, prepared by the Ju-

dicial Conference, provided for the option of committing youth offenders to the custody of the Attorney General for treatment "in lieu of the penalty otherwise provided by law" (see *Federal Corrections Act and Improvement in Parole,* Hearings on H.R. 2139 and H.R. 2140 before Subcommittee No. 3 of the House Committee on the Judiciary, 78th Cong., 1st Sess. 3 (1943) (hereafter referred to as "House Hearings")). As so written, the statute would have substituted YCA commitment for any other form of punishment. By modifying the provision to apply in lieu of the penalty "of imprisonment" Congress evidenced its intent not to preclude fines. See *United States* v. *Oliver,* 546 F. 2d 1096, 1098 (C.A. 4); *Cramer* v. *Wise,* 501 F. 2d 959, 961 (C.A. 5) (dictum); but see *United States* v. *Hayes,* 474 F. 2d 965, 967 (C.A. 9).

This conclusion is confirmed by the history of the modification of the Judicial Conference draft to insert the words "of imprisonment." The change was made at the suggestion of Attorney General Biddle, who advised that the proposals he was transmitting had resulted from a conference among himself, the Director of the Bureau of Prisons, and the members of the Judicial Conference who had been active in proposing the YCA (House Hearings 110). In a letter to Congress, the Attorney General offered the following explanation of the need for this particular amendment (House Hearings 111):

> Sentence of the youth offender to the custody of the Authority should be a permissible alternative to a penalty of imprisonment otherwise provided by law but not to a penalty of a fine. It should, moreover, be possible for the court both to impose a fine and to sentence the offender to the custody of the Authority, where the law provides both fine and imprisonment as the penalties that may be imposed.

In view of the central role of the Judicial Conference in the framing of this legislation (see *Dorszynski* v. *United States, supra,* 418 U.S. at 432), it can reasonably be concluded that, when the Congress adopted this change in language, following review and approval of the proposed change by the judges active in formulating the YCA, it did so for the reasons advanced in the Attorney General's explanatory letter. It appears clear, therefore, that Congress intended to permit fines to be imposed in conjunction with sentencing to the custody of the Attorney General under Section 5010 (b) and (c).

C. FINES MAY BE IMPOSED AND RESTITUTIONS REQUIRED IN CONNECTION WITH A PROBATED SENTENCE UNDER SECTION 5010(a)

Since fines may be imposed under YCA upon youth offenders who are committed to custody pursuant to Section 5010(b) or 5010(c), as well as upon those who are sentenced as adults by virtue of Section 5010 (d), it would be most surprising if fines could not be levied upon youth offenders admitted to probation under Section 5010(a), as petitioners were. And, indeed, the option to impose fines upon and require restitution of convicted defendants admitted to pro-

bation is preserved in the YCA. Section 5023(a) specifically provides: "Nothing in [the Youth Corrections Act] * * * shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect the provisions of chapter 231 [Sections 3651–3656] of this title * * * relative to probation." Under 18 U.S.C. 3651, one of the sections to which reference is made in Section 5023, a fine may be imposed as a condition of probation "in one or several sums," and as a further (or alternate) condition, the offender may be required to make restitution or reparation "to aggrieved parties for actual damages or loss caused by the offense for which conviction was had."[4]

The legislative history of Section 5023 confirms that Congress intended that the provisions of Title 18

[4] The YCA now contains some modifications to usual probation procedures, added in 1961 by the Act of October 3, 1961, 75 Stat. 750. That Act added a new subsection (b) to 18 U.S.C. 5021, providing that "[w]here a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction." Prior to this amendment, only the youth offender committed under Section 5010 (b) or (c) could be unconditionally discharged and have his conviction set aside. The amendment corrected this disparity by extending the same benefit to the youth offender who had been placed on probation. See H.R. Rep. No. 433, 87th Cong., 1st Sess. 1 (1961). There is no indication in the legislative history that this amendment was intended to accomplish any other alteration in the sentencing judge's authorities relating to probation.

dealing with probation would continue to apply to youth offenders sentenced to probation in the same manner as they had before enactment of the YCA. The House Report on S. 2609, the bill that became the YCA in 1950, states categorically (H.R. Rep. No. 2979, *supra*, at 3; emphasis supplied):

> Under [the bill's] provisions, if the court finds that a youth offender does not need treatment, it may suspend the imposition or execution of sentence and place the youth offender on probation. *Thus, the power of the court to grant probation is left undisturbed by the bill.*

See also identical statement by Judge Orie L. Phillips (House Hearings 31).

Similarly, during the House Hearings Judge Phillips, the chairman of the Judicial Conference committee that drafted the bill that led to the YCA, responded to Representative Cravens' inquiry whether the bill "in any way affect[s] the so-called probation system" as follows (House Hearings 37):

> Not at all. * * * [W]e found it was working well and concluded it ought not be disturbed. * * * It leaves [the probation system] absolutely undisturbed.

The same view was echoed in the testimony of Judge Hincks, another member of the Judicial Conference Committee, whose statement demonstrates the intent to retain the existing options with respect to probation and adult punishment, while simply adding by the Act a new option of commitment for treatment.[5]

Petitioners' bald assertion (Br. 7) that "the sentencing alternatives of the [YCA] * * * act as a substitute for the penalties set out in the statute under which the defendant is found guilty" is therefore simply not supported by either the language of the statute, which expressly preserves the probation provisions of Chapter 231, or by its legislative history. The YCA as originally enacted merely provided a substitute for the penalty of imprisonment as an adult offender, for use at the judge's discretion: commitment to the Attorney General for treatment. The judge could, however, also sentence the offender as an adult; the YCA did not "substitute" for this authority. Similarly, the probation authority was retained undiminished.

[5] Judge Hincks explained the purpose of the Judicial Conference proposal as follows (House Hearings 74–75):

"Under existing law (as indeed under the proposed bill) a judge can, when he thinks it wise, admit a youth offender to probation under a suspended sentence. Thus without title III a judge has ample power to make a lenient disposition of the case.

"And under existing law (as also under the proposed bill) the judge has ample power to sentence the youth offender as an adult and thus accomplish his confinement in a Federal reformatory or penitentiary where he will be in [the] company with upward of a thousand other inmates, some as old as 30, or in a local jail housing the sewage of local humanity. Thus without title III, the judge has power to make a drastic disposition of a case.

"But time and time again it has been my distressing experience to have to deal with a youth offender deserving neither the lenient nor the drastic treatment which alone is available. * * *

* * * * *

"Against this background, I feel that title III of the act [relating to youth offenders] will be a godsend to the judge as providing an

Petitioners further argue (Br. 7) that a fine can be imposed under the general probation statute, 18 U.S.C. 3651, only "when the statute under which the defendant is sentenced specifically provides for a fine" and that, since the YCA "makes no such specific provision, a fine is impermissible when an offender is sentenced under its provisions." This argument has as its premise petitioners' earlier assertion that the YCA acts as a substitute for all the penalties set out in the statute that the defendant is convicted of having violated. Since, however, this assertion is contradicted by both the language and the history of the statute, the entire argument must fail.[6] The YCA was not intended to replace the existing powers associated with imposition of probation, and therefore the usual procedures for admin-

ideal disposition for the usual youth offender. Under its provisions, he will get needed discipline and training with a minimum exposure to contaminating influences, and will be returned to his normal environment under experienced supervision as soon as the state of his character development shall warrant."

[6] In *Cramer* v. *Wise*, *supra*, 501 F. 2d at 962, in an opinion on which petitioners rely (Br. 10), the Fifth Circuit concluded (footnote omitted):

"* * * The provisions of 18 U.S.C. § 5010 (a), (b) [,] (c) and (d) are progressive in nature and exclusive of each other. It would seem illogical to conclude that these detailed provisions, so obviously exclusive of each other, are not so exclusive of provisions not contained within the Act [*e.g.*, *fines*] which the Act was designed to supplant."

We cannot agree that because the subsections of Section 5010 are "progressive," it follows that they are also exclusive of other provisions of law. The language of the statute simply does not support this reasoning. Subsection (d), for example, specifically requires reference to other provisions of law in fixing the sentence. And

istering probation are applicable, including the provisions of Chapter 231 relating to imposition of fines and restitution.[7]

II

NEITHER A FINE NOR RESTITUTION IS INCONSISTENT WITH THE REHABILITATIVE PURPOSES OF THE YOUTH CORRECTIONS ACT

1. Those courts of appeals that have held that fines and requirements of restitution are impermissible in the sentencing of a youth offender have not

subsection (a), through the operation of Section 5023, incorporates the variety of provisions in Chapter 231 relating to administration of probation. Indeed, reference to Chapter 231 is necessary in order to determine how probation under the YCA is to be administered, since Section 5010(a) provides no guidance in this regard. (For example, authority to arrest for violation of the conditions of probation (Section 3653); authority to revoke or modify any condition of probation (Section 3651); provision for release from liability upon having satisfied the terms and conditions of probation (Section 3651).)

[7] Petitioners suggest (Br. 8) that a recent case, *United States* v. *Coleman*, 414 F. Supp. 961 (D. Md.), holding that the special parole term imposed under 21 U.S.C 841(b)(1)(B) is inapplicable to an offender sentenced pursuant to Section 5010(b), is persuasive of the position that fines may not be imposed pursuant to Section 5010(a). That case is inapposite, however, because, as the court noted, the special parole term is to be added to "any sentence imposing a term of imprisonment," and thus by its terms does not extend to a sentence not relating to a term of imprisonment, such as sentence under Section 5010(b), which is "in lieu of penalty of imprisonment otherwise provided by law." 414 F. Supp. at 962–963. See also *United States* v. *Myers*, 543 F. 2d 721 (C.A. 9). The proper treatment of the special parole term, which by its terms is to be used only in conjunction with adult sentences of imprisonment, is therefore not instructive as to the correct treatment of fines.

done so on the basis of an analysis of the language and history of the pertinent specific provisions of the YCA discussed above, but rather as a result of the general conclusion that such exactions are inconsistent with the Act's focus upon rehabilitation of youth offenders. See *United States* v. *Bowens*, 514 F. 2d 440, 441 (C.A. 9); *United States* v. *Mollet*, 510 F. 2d 625, 626 (C.A. 9); *Cramer* v. *Wise*, *supra*, 501 F. 2d at 962, *United States* v. *Hayes*, *supra*, 474 F. 2d at 967.[8] *Contra*, *United States* v. *Hix*, 545 F. 2d 1247 (C.A. 9) (as to restitution); *United States* v. *Buechler*, C.A. 3, No. 76–2362, decided June 22, 1977. Petitioners too rely in large part upon the proposition that the rehabilitative goals of the YCA preclude the sanctions imposed upon them in this case (Br. 9–10).

This argument simply cannot survive the evidence of the legislative history. As we have shown (pp. 13–18, *supra*), Congress specifically amended the language originally proposed for subsections (b) and (c)

[8] In concluding that fines may not be imposed, *Hayes* relied on the authority of *United States* v. *Waters*, 437 F. 2d 722 (C.A. D.C.), which disapproved the combination of an adult sentence with the recommendation that the youth offender be placed in an youth facility. The *Waters* court stated (*id.* at 726) that "the statutory scheme does not envisage *this particular* combination of of rehabilitation and deterrence" (emphasis supplied). The case did not turn, as the Ninth Circuit suggested, on a broad principle that deterrent sanctions may not be applied to youth offenders—indeed, the *Waters* court noted that the enlarged sentence provisions of subsection (c) could properly be used to achieve this effect—but rather on the fact that a youth offender may not be given an adult sentence where, as here, the sentencing court apparently thought the youth would benefit from treatment under subsection (b) or (e).

in order to ensure that fines could be imposed on youths committed to the custody of the Attorney General under the Act. It also purposefully preserved the pre-existing sentencing options associated with probation. Congress, in short, must be deemed to have considered fines to be entirely consistent with the rehabilitative theory of the Act.

Even if this dispositive legislative history were not available, the proposition that fines are inconsistent with the intention of the Act could not be sustained. The Act was specifically directed at providing an alternative to one punitive program, imprisonment as an adult offender. True, the Act made imprisonment available only in those circumstances, presumably relatively infrequent, in which the sentencing judge finds that the offender will not benefit from commitment under subsection (b) or (c). See *Dorszynski* v. *United States, supra.* But one cannot extrapolate from the fact that imprisonment as an adult is not favored for youth offenders to the conclusion that all forms of "punishment" have been forbidden. This would require reading into the Act provisions that the Act does not contain, on a topic as to which it is silent.

It is by no means clear in any event that a fine should be labeled as punitive, since it has strong rehabilitative aspects as well. As the district court in this case stated (A. 35–36):

> [A] fine could be consistent * * * with the rehabilitative intent of the Act. By employing this alternative [of fine and probation], the sentencing judge could assure that the youthful offender would not receive the harsh treatment of incarceration, while assuring that the offender accepts responsibility for his transgression. The net result of such treatment would be an increased respect for the law and would, in many cases, stimulate the young person to mature into a good law-abiding citizen.

See also *United States* v. *Buechler, supra,* slip op. 9 and n. 4; *United States* v. *Oliver, supra,* 546 F. 2d at 1099 n. 3; *United States* v. *Prianos,* 403 F. Supp. 766, 769–770 (N.D. Ill.). As the district court suggests, the imposition of a fine can have pedagogic aims—for example, to teach the offender that his offense is a serious one, although in petitioners' cases not so serious as to warrant incarceration, or that he must think through, and accept responsibility for, the consequences of his actions. These lessons can be as rehabilitative in effect as any of the various other conditions of probation that can be imposed under the Act, such as that the offender obtain and keep employment. See *Driver* v. *United States,* 232 F. 2d 418, 421 (C.A. 4).[9] Therefore, even if Congress did intend to preclude punitive measures being taken as to of-

[9] It is significant that the federal probation system has provided for fines since its creation by statute in 1925, and yet this system is regarded as rehabilitative in its aim. As the House Report on the S. 1042, the bill that became the Probation Act of March 4, 1925, stated (H.R. Rep. No. 1377, 68th Cong., 2d Sess. 2–3 (1925)):

"Probation is the method by which the court disciplines and gives an opportunity to reform to certain offenders without the

fenders sentenced under subsection (a), (b) or (c) of Section 5010—an assertion in which we cannot concur—fines nonetheless are permissible as a condition of probation under the Act, since their punitive aspects are at least matched by their rehabilitative and deterrent uses.

2. The objections raised as to imposition of fines—that they are necessarily punitive and therefore inconsistent with the purposes of the YCA—cannot in any event be said to apply to restitution, which merely repays the victim for damage caused by the offender (18 U.S.C. 3651). Therefore, as the Third and Ninth Circuits have recognized (*United States* v. *Beuchler, supra; United States* v. *Hix, supra*) restitution is permissible as a condition of probation under the YCA.[10]

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hardship, the expense, and the risk of subjecting them to imprisonment. * * *

"* * * The probationer is encouraged in industrious, law-abiding habits * * *.

"* * * In many such cases, probation is not only the humane but the practical and effective treatment, avoiding the disgrace and stigma of a prison sentence."

[10] As the Third Circuit stated in *Beuchler*, after noting that it found the reasoning of *Oliver*, *supra*, and *Prianos*, *supra*, "most persuasive" and concluding that the probation provided for in Section 5010(a) "must be governed by the general probation provision, section 3651," which "expressly permits probation to be conditioned upon restitution and fines" (slip op. 8–9; footnote omitted):

"In our view, restitution is certainly not inconsistent with rehabilitative aims. * * * [T]he restoration of the proceeds of the crime, in and of itself, may be an expiatory act. As some commentators have observed, making amends by making restitution may prove to be just the catharsis that a youthful offender needs in order to regain the self-respect—or respect for others—that will enable him to respect the law thenceforth. In any event, the youth will have learned the first lesson that society—in its effort to rehabilitate *all* offenders—tries to teach: society, whenever it can help it, will not allow crime to pay."

Petitioners do not dispute that restitution cannot be categorized as punitive; rather, they argue (Br. 11) that a requirement of restitution should nonetheless not be permitted under the YCA because it may be used by sentencing courts to disguise impermissible fines. Petitioners' fear is without basis, since restitution is limited by the "actual damages or losses caused by the offense" (see 18 U.S.C. 3651) and must be justified, if challenged, on that basis. See *United States* v. *Clovis Retail Liquor Dealers Trade Assn.*, 540 F. 2d 1389, 1390 (C.A. 10), and cases cited therein; *United States* v. *Beuchler, supra,* slip op. 10–11.

Restitution is, moreover, permissible as a condition of probation not merely because it serves an educational and rehabilitative function consistent with the Act but because, as we have argued in Part I of this brief, the Youth Correction Act specifically authorizes its use in conjunction with the granting of probation. See 18 U.S.C. 5023(a) and 3651.

3. Finally, the result that petitioners seek would be counterproductive because it would materially limit the options available to sentencing judges in the case of youth offenders, contrary to the Congressional goal in enacting the YCA of expanding those options. If

petitioners are correct that the Act bars fines and restitution orders in conjunction with probation under Section 5010(a), then a judge who wishes to sentence a youth offender, such as one of the petitioners, to probation, and to impose a fine as a condition of probation in order to impress the youth with the seriousness of his offense, would be required to make a finding that the youth would not benefit from commitment under subsection (b) or (c), and then to sentence him as an adult offender under subsection (d). The youth offender would thereby lose the valuable benefit of being able to have his conviction set aside under Section 5021. In the alternative, the judge could, contrary to his considered judgment, sentence the offender to probation without a fine (or restitution), or impose the custodial sanction of Section 5010 (b) or (c), although he does not believe that to be truly necessary (see discussion at A. 36–37.)

For the reasons we have outlined, we do not believe that the Congress has thus impaired the sentencing judge's flexibility and reduced the potential and attractiveness of probation under Section 5010(a). See *United States* v. *Oliver, supra,* 546 F. 2d at 1099. Rather, as the court of appeals correctly determined in this case, fines and restitution can in fact be imposed, as appropriate, as a condition of probation under Section 50010(a).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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